

LOWERRE & FREDERICK

ATTORNEYS AT LAW
44 East Avenue, Suite 100
Austin, Texas 78701
(512) 469-6000 • (512) 482-9346 (facsimile)
Mail@LF-LawFirm.com

2007 JUN 18 PM 4:30

CHIEF CLERKS OFFICE

June 18, 2007

Ms. LaDonna Castañuela, Chief Clerk
TCEQ, Office of the Chief Clerk (MC-105)
P.O. Box 13087
Austin, Texas 78711

Via Hand Delivery


Re: *Application of ASARCO Inc., for Renewal of Air Quality Permit No. 20345, SOAH*
Docket No. 582-05-0593, TCEQ Docket No. 2004-0049-AIR

Dear Ms. Castañuela:

Enclosed for filing in the above referenced matter, please find an original and eleven copies of Protestant Sierra Club's Comments on Applicant's Modeling and the Executive Director's Report.

Please contact me at the number above if you have any questions.

Sincerely,


L. Layla Mansuri

cc: Mr. Oliver Bernstein, Sierra Club Deputy Press Secretary
Mr. Derek Seal, TCEQ General Counsel
All Parties of Record

SOAH DOCKET NO. 582-05-0593
TCEQ DOCKET NO. 2004-0049-AIR

2007 JUN 18 PM 4:30

IN THE MATTER OF THE
APPLICATION OF ASARCO, INC.
FOR RENEWAL OF
AIR QUALITY PERMIT NO. 20345
EL PASO, EL PASO COUNTY

§
§
§
§
§

BEFORE THE STATE OFFICE

CHIEF CLERKS OFFICE

OF

ADMINISTRATIVE HEARINGS

**PROTESTANT SIERRA CLUB'S COMMENTS ON THE APPLICANT'S
MODELING AND THE EXECUTIVE DIRECTOR'S REPORT**

**TO THE COMMISSIONERS OF THE TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY:**

I. Introduction.

A. ASARCO, Inc., continues to seek renewal of its air quality permit for an inoperable plant – a plant that last operated over eight years ago. If there were ever a case of speculative permitting – this is it.¹ ASARCO failed to come forward with any specific plans on the record about re-start or re-opening. Instead, ASARCO has been allowed to abuse the permitting system – it failed to prove that it would not cause or

¹ ASARCO failed to submit evidence into the evidentiary record which would indicate that it has any plans to re-start operations at this plant. Tr. at 165-66 (Cross Exam (by Mr. Richard Lowerre) of ASARCO witness Mr. Lawrence Castor).

Q. And have you seen a document prepared by Asarco that identifies when this facility is going to restart?

A. No, there's no such document that I know of.

Q. And so there is no current intent to restart it any certain date?

A. Well, I certainly hope it starts at some certain date, but I'm not privy to the strategic planning Asarco may have on that. I don't know of anything like that.

Q. So it could be five years, 10 years, 15 years, 20 years down the road before it restarts?

A. Theoretically, it could.

contribute to a condition of air pollution or that its compliance history did not warrant denial of its application for permit renewal. For two weeks, ASARCO and your own Executive Director participated in an evidentiary hearing, participated in voluminous post-hearing briefing and yet, ASARCO did not meet its burden and the Executive Director failed to justify its determination that ASARCO's permits should be renewed. Now, ASARCO and the Executive Director have failed to comply with the deadlines established in your March 10, 2006 order.

B. This Commission is creating a legacy of meaningless public participation in the air permitting arena. The public provided this Agency with an ample evidentiary record that demonstrates why ASARCO's air permit should be denied. This evidence was produced where the agency's staff acknowledged it, the staff, lacked the expertise to determine if the application meets the requirements for renewal in the Texas Health and Safety Code.²

In the comments below, Sierra Club will (1) re-iterate why the Commission should immediately deny the permit, (2) address why the Executive Director's report does not address the failures laid out in the ALJ's October 27, 2005 proposal for decision and the evidentiary record, and (3) show that should this Commission desire to adopt, consider, or to rule on the Executive Director's report, such adoption, consideration or ruling is premature at this time, inasmuch as the information contained therein must be remanded to SOAH and the evidentiary record in this matter re-opened.

² See, for example, the Executive Director's August 10, 2006 letter to Lairy Johnson.

II. The Commission Should Immediately Deny ASARCO's Request for Renewal.

A. The City of El Paso's Motion for Immediate Denial of ASARCO's Application should be granted. On June 4, 2007, the Sierra Club filed a motion with the Commission supporting the City of El Paso's (City) May 22, 2007 *Motion to Re-Urge Immediate Denial of ASARCO's Application*. The Sierra Club continues to support the City's motion.

B. The Commission's March 13, 2006 order that there be an investigation into pollution control equipment does not alter the "ineffectiveness" finding that the Commission also made. The Commission's March 13, 2006 order states that ASARCO failed to meet the minimum requirements of renewal under TEX. HEALTH & SAFETY CODE § 382.055(d)(2). Specifically, the Commission order states that ASARCO failed to demonstrate the "effectiveness of its existing emission control equipment and practices under § 382.055(d)(2)." The Commission order goes on to explain that the report issued by the ED will make findings with regard to the condition of the existing emission control equipment under § 382.055(d)(2).

It is inappropriate to now invoke the results of the ED's study to nullify or buffer the ineffectiveness finding from last year. Findings with regard to the condition of the existing control equipment cannot change the already-demonstrated lack of effectiveness. It cannot matter if an Applicant has equipment that is in perfect working order (which certainly no one, not even the Applicant, has dared to argue is the case at ASARCO) if said equipment and practices are not effective. As stated by the Commission, ASARCO has failed to meet the minimum requirements for renewal. Further inquiry in the

condition of the equipment can have no impact under the prior finding pursuant to § 382.055(d)(2).

If an Applicant cannot demonstrate that it will not cause or contribute to a condition of air pollution, it may not have a permit. To take any other action than to deny the permit violates the explicit purpose of the Texas Clean Air Act. *See*, TEX. HEALTH & SAFETY CODE § 382.002. ASARCO failed to make the required demonstrations. The ED's report fails to change the impact of ASARCO's failures – the application must be denied.

C. The Commission has the authority to deny an air permit. The Commission both misinterpreted TEX. HEALTH & SAFETY CODE § 382.055 and erred in its determination that it lacked the authority to deny an air permit.

1. The procedural requirements of TEX. HEALTH & SAFETY CODE § 382.055 apply to the Executive Director's review of the renewal application.³

The foray into the current reporting process has been a monumental waste of state resources, and now, of Protestant's resources. Moreover, it has given credence to the adage "justice delayed is justice denied." The application of this process is clear error on the part of the Commission and continues to create procedural error with regard to evidentiary record.

³ The Sierra Club incorporates in its entirety, Sierra Club's April 3, 2006 *Motion for Rehearing*, which sets out numerous errors in the Commission's March 10, 2006 order. *See*, also, the Office of Public Interest Counsel's *Response to Motions for Rehearing* and its arguments regarding the misapplication of the Executive Director's reporting process to this late stage of proceedings before the Commission.

While the March 10, 2006 order does not specifically refer to § 382.055(f), the order is clearly based on subsection f, which reads:

On or before the 180th day after the date on which an application for renewal is filed, the commission shall renew the permit or, if the commission determines that the facility will not meet the requirements for renewing the permit, shall: (1) set out in a report to the applicant the basis for the commission's determination; and (2) establish a schedule, to which the applicant must adhere in meeting the commission's requirements, that: (A) includes a final date for meeting the commission's requirements; and (B) requires completion of that action as expeditiously as possible. TEX. HEALTH & SAFETY CODE § 382.055(f) (77th Leg. Ch. 965, s. 16.14, eff. Sept. 1, 2001)(emphasis added).

The Commission erred by relying on this provision because, procedurally, it is no longer applicable to this matter.

Statutory construction requires a reading of section 382.055 within the context of TCEQ's other statutory authority regarding permit processing, i.e., "HB 801" proceedings. Section 382.055(f) is applicable to the decisions of the Executive Director during the HB 801 process.⁴ In fact, ASARCO applied for its renewal on March 28, 2002. The renewal did not come before the Commission for decision until April 28, 2004 – over two years or more than 760 (not 180) days since the application date. The

⁴ It surely could not have been the intent of the legislature that air permit renewal applications would run through the HB 801 process to reach the Commission for action within 180 days. In fact, renewals customarily are not even technically complete within 180 days. A quick search of TCEQ's online databases shows numerous examples. Here are just a few:

NSR permit nos. 1491 and 1492 for CPS – application received 01/02/03. Technical review was not completed until 11/20/03, well beyond 180 days.

NSR permit no. 9696 for DPC Industries – application received 01/03/03. Technical review was not completed until 02/17/04, over one year later.

NRS permit no. 21143 for Hanson Aggregates – application received 01/10/03. Technical review was not complete until 04/27/04, again over a year later.

Legislature explicitly recognized that the powers and duties under § 382.055 could be delegated to the Executive Director. TEX. HEALTH & SAFETY CODE § 382.061.

Delegation of Powers and Duties. The commission may delegate to the executive director the powers and duties under Sections 382.051-382.0563 and 382.059, except for the adoption of rules. (b) An applicant or a person affected by a decision of the executive director may appeal to the Commission any decision made by the executive director with the exception of a decision regarding a federal operating permit, under Sections 382.051-382.055 and 382.059.

The Commission did delegate this authority to the Executive Director.

The sections in Subchapter D (§ 116.310, Notification of Permit Holder, § 116.311, Permit Renewal Application, § 116.312, Public Notification and Comment Procedures, § 116.313, Renewal Application Fees, § 116.314, Review Schedule) were included in the regulatory reform changes. The Commission is readopting **these sections because they implement the TCAA requirements of § 382.055, concerning renewal of NSR permits.** 23 Tex.Reg. 6977 (July 3, 1998) (emphasis added).

In fact, the agency goes on to explain that “Section 116.314, concerning Review Schedule, is amended to refer to the correct chapters of the commission’s regulations concerning contested case hearings.” *Id.* See, 30 TEX. ADMIN. CODE §§ 116.310 - 116.314, implementing TEX. HEALTH & SAFETY CODE § 382.055. Specifically, 30 TAC § 116.314 provides:

(a) Renewal of permit. The executive director shall renew a permit and notify the permit holder in writing if it is determined that the facility meets the requirements of this subchapter.

(b) Denial of renewal. Prior to denial, the executive director shall provide notice to the permit holder with a report which describes the basis for denial.

(1) If denial is based on failure to meet the requirements of §116.311(a) or (b) of this title (relating to Permit Renewal Application), the report shall establish a schedule for compliance with the renewal requirements.

(A) The report shall be forwarded to the permit holder no later than 180 days after the commission receives a completed application.

(B) The permit shall be renewed if the requirements are met according to the schedule specified in the report. The executive director shall notify the permit holder in writing of the permit renewal.

(2) If denial is based on failure to maintain substantial compliance with the TCAA or the terms of the existing permit under §116.311(c) of this title, the renewal denial shall be final. The executive director shall notify the permit holder in writing of the denial.

(c) Contested case hearing. **After failure to satisfy the commission requirements for corrective action by the deadline specified in the executive director's report, the applicant shall show cause in a contested case proceeding why the permit should not expire. The proceeding will be conducted under the APA and Chapters 1, 55, and 80 of this title (relating to Purpose of Rules, General Provisions; Request for Contested Case Hearings; Public Comment; and Contested Case Hearings). (Emphasis added.)**

The Executive Director made a determination that ASARCO met the requirements for renewal under 30 TEX. ADMIN. CODE § 116.311.⁵ Because the ED determined that ASARCO's permit should be renewed, there was no need for him to proceed with the reporting provisions of 30 TAC 116.314. Thus, the Commission's late application of TEX. HEALTH & SAFETY CODE § 382.055 (f) is procedurally incorrect. Because the Commission may not interpret a statute in a manner that would lead to an absurd result, it should abandon the process set forth in its interim order. See, *Barshop v. Medina Cnty Underground Water Conservation Dist.*, 925 S.W.2d 618, 629 (Tex. 1996) (citing *McKinney v. Blankenship*, 154 Tex. 632, 282 S.W.2d 691, 698 (Tex. 1955)).

⁵ See, in particular, 30 TAC §116.311(a) (requiring that the permit holder shall submit information in support of the application which demonstrates criteria in sections 116.311(a)(1)-(6)) and 30 TAC §116.311(c) (requiring a compliance history review).

2. The Commission has authority to deny the renewal application. It seems antithetical to the normal hierarchy of authority that the Executive Director would have the authority to deny an application for renewal of an air permit, but the Commission would not. In the instant case, the Executive Director simply failed to make the determination under 30 TAC § 116.314 that the permit application should be denied.

The Commission has independent authority to deny an application for an air permit.⁶

COMMISSION ACTIONS. **The commission may grant or deny an application in whole or in part...or take any other appropriate action.** 30 TAC § 50.117 (emphasis added).

In addition, as noted in the Sierra Club's motion for rehearing, the Commission may revoke ASARCO's permit under TEXAS WATER CODE §§ 7.302 and 7.303.

III. The Executive Director's Report Fails to Address Critical Findings of Fact and Conclusions of Law.

Sierra Club adopts and incorporates by reference the entirety of the technical and substantive comments of the City of El Paso with regard to the Executive Director's report and the Applicant's additional modeling.

Nothing in the Executive Director's report changes the findings of the ALJs in this matter. ASARCO has not met its burden and the Executive Director has failed to show

⁶ See also, TEX. HEALTH AND SAFETY CODE § 382.025(a): ORDERS RELATING TO CONTROLLING AIR POLLUTION. "If the commission determines that air pollution exists, **the commission may order any action** indicated by the circumstances to control the condition." (Emphasis added.)

that there is a basis for altering the ALJs' proposed findings and conclusions.⁷ In addition to the City of El Paso's comments, Sierra Club raises the following issues.⁸

A. Lack of staff expertise makes ability of future enforcement highly speculative.

On several occasions, the Executive Director has stated that his staff lacks the expertise to "assess equipment that has not been operating, staff has been unable to assess the sufficiency of existing plant control equipment and practices and whether the plant can operate in accordance with the permit conditions and with industry standards and practices." See August 10, 2006 letter from Mr. Glenn Shankle to Mr. Lairy Johnson. How, then, will the public be assured that ASARCO has complied with the conditions proposed by the Executive Director on start-up? Has the Commission procured funding to conduct another site review and commission another report from a process engineer that ASARCO is complying with its terms? Has ASARCO set aside such funding? How does the Commission expect any degree of public confidence, if, as here, the Commission has acknowledge resource inadequacies and has not put forth a means by which to compensate for them?

B. Stack Testing is too late and too infrequent. Under the Executive Director's proposed permit terms, ASARCO would not be required to perform any stack testing for

⁷ Moreover, the ED's report should not be used to 'rehabilitate' ASARCO's case or assist ASARCO in meeting its burden of proof. See, TEX. WATER CODE § 5.228(d) and 30 TAC § 80.108 (e). The implications of the provisions limiting the Executive Director's actions in a contested case hearing is yet another example of why the Commission's application of 382.055(f) is out of order.

⁸ While Sierra Club comments below on specific permit terms, it in no way endorses the Commission's review of any post-record closing evidence. Given the procedural oddity of this matter, the limited comments below are offered in an attempt to ensure that *if* a permit is issued, to the extent possible, the permit protects the public health.

2 months after start-up. This is far too long to wait for the citizens of El Paso to know if the plant is operating as represented. Of particular concern is the potential for lead emissions to exceed permitting amounts during the start-up period. The stack emissions are the single largest permitting source of lead. Thus, stack testing should occur within 15-20 days of startup. More importantly, the permit fails to require continuous emissions monitoring (CEM) for lead or a set schedule of periodic stack testing for lead. Some monitoring method needs to be required for ASARCO to demonstrate continuous compliance with the stack lead emissions rate.

C. Monitoring provisions in the proposed permit are not sufficient to ensure the “condition and effectiveness of existing emission control equipment and practices.”⁹ At this time, no fence line monitoring is required in the permit. Stack CEMS are the only monitors (although, as noted above, not required for lead). The Commission should require a fence line ambient air monitoring program around the perimeter of the smelter for ASARCO to demonstrate continuous compliance with the lead NAAQS. An independent audit should be required to be performed annually of the fence line ambient air data.

In addition, ASARCO should bear the cost of funding an increased lead community ambient air monitoring program to demonstrate that no harm is taking place in the community to children and to confirm continuous compliance with the lead NAAQS to protect public health. Current lead ambient air monitoring is far too limited.

⁹ TEX. HEALTH & SAFETY CODE § 382.055(d) (setting out minimum commission considerations for permit renewal). See, also, TEX. HEALTH & SAFETY CODE § 382.055 (e) (**requiring** that the Commission impose requirements to ensure compliance with state and federal requirements).

Again, an independent audit to be required to be performed annually of the lead ambient air data.

Finally, pursuant to TEX. HEALTH & SAFETY CODE §§ 382.055(d) & (e) the Commission should require an independent compliance audit to be performed annually of the smelter's operations since ASARCO can not be trusted based on 100 years of sloppy plant operations, high lead/metals, PM2.5, PM10, SO2, and H2SO4 emissions.

IV. Motion for Remand: The Commission's Misapplication of Section 382.055 Continues to Create Procedural Errors.

When the Commission referred this matter to SOAH under its plenary authority,¹⁰ the procedural requirements and rights of the Administrative Procedures Act (APA) were invoked. A contested case hearing was conducted pursuant to Commission rule and Chapters 2001 and 2003 of the Texas Government Code. There is no need to now recount the procedural history of that lengthy contested case hearing. What is important to recount is that the record in this matter is closed.

When the record closes under Chapter 2001 proceedings (or APA proceedings), the Commission may not consider evidence outside the record.

The Commission may amend the proposal for decision, including any finding of fact, but any such amendment thereto and order **shall be based solely on the record made before the administrative law judge....**The commission may also refer the matter back to the administrative law judge to reconsider any findings and conclusions set forth in the proposal for decision or take additional evidence or to make additional findings of fact or conclusions of law. TEX. GOV'T CODE § 2003.047(m) (emphasis added).

¹⁰ It is worth noting that ASARCO unsuccessfully challenged the Commission's plenary authority in District Court. See the March 9, 2005 order of the Honorable Judge Jeanne Meurer.

See, Heat Energy Advanced Tech., Inc. v. West Dallas Coalition for Env't Justice, 962 S.W.2d 288 (Tex. App. – Austin 1998, pet. denied)(The Commission exceeded its statutory authority in substitution its findings and conclusions for the those of the ALJ).¹¹

Moreover, through the APA, the legislature explicitly granted due process rights to parties. If the Commission determines to reopen the record to accept additional evidence (i.e., the Executive Director's report), Sierra Club objects to the admission of any additional evidence without remand of the matter to SOAH for the opportunity for all parties to conduct discovery regarding the additional evidence, present additional evidence and argument of their own (required under TEX. GOV'T CODE § 2001.051), and participate in an additional evidentiary hearing where evidence and testimony may be presented and cross-examined for a full disclosure of the facts (required under TEX. GOV'T CODE §§ 2001.081 & 2001.087).

No protestant has been able to cross examine Mr. Srackangast, the purported 'independent third party' and 'qualified modeler' who submitted an audit of ASARCO's modeling. Neither has any protestant been able to cross-examine or conduct any kind of discovery with regard to the additional modeling undertaken by Zephyr Environmental Corporation. The same is true with regard to the Eric Partelpoeg of EHP Consulting, Inc., report.

¹¹ See also, Sierra Club's April 3, 2006 Motion for Rehearing, Section (I.). "The Commission erred to neither accept the findings and conclusions of the ALJs or, in the alternative, as to each one not accepted, to have stated in writing the specific reason and legal basis for its rejection."

The Commission now appears to be engaging in a motion to overturn-type proceeding – where it will consider material that has not been subject to the procedural due process requirements and rights provided under the APA. Not only are the rights of the protestants being violated, the Commission – if it adopts the Executive Director’s report, is about to make a disaster out of the administrative and evidentiary record – will be mixing APA and non-APA proceedings. Due process requirements under Article 1, Section 19 of the Texas Constitution, require adjudication in the courts or at the agency. *See, Trapp v. Shell Oil Co.*, 198 S.W.2d 424 (Tex. 1946) and *Pickens v. Railroad Comm’n*, 387 S.W.2d 35 (Tex. 1965).

Should the Commission decline to deny ASARCO’s application for renewal, Sierra Club moves, pursuant to 30 TAC § 80.265¹², to remand this matter to SOAH for the taking of additional evidence. *See, City of San Angelo v. Texas Natural Resource Conservation Comm’n*, 92. S.W.3d 624, 627 (Tex. App. – Austin 2002, no writ) (The Commission has broad authority to remand cases back to SOAH to gather additional evidence.). Only through a remand to SOAH, for consideration of additional evidence (i.e., the Executive Director’s report and the analysis underlying it) may the proper process be afforded to the parties. And only through a remand to SOAH may the Commission create an appropriate evidentiary record that will not create further undue delays and costs in the Texas court system.

¹² The commission, on the motion of any party or on its own motion, may order the judge to reopen the record for further proceedings on specific issues in dispute. The commission's order shall include instructions as to the subject matter of further proceedings and the judge's duties in preparing supplemental materials or revised orders based upon those proceedings for the commission's adoption. 30 TAC § 80.265.

V. Prayer.

WHEREFORE, PREMISES CONSIDERED, the Sierra Club respectfully requests that this Commission immediately deny ASARCO's application for renewal of air permit no. 20345. In the alternative, should this Commission determine that it wishes to adopt or rely on any information presented after the close of the evidentiary record, Sierra Club prays the Commission remand this matter to SOAH for additional fact-finding and in compliance with the Texas Clean Air Act.

Respectfully Submitted,

LOWERRE & FREDERICK

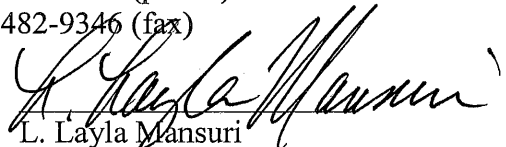
44 East Avenue, Ste. 100

Austin, Texas 78701

(512) 469-6000 (phone)

(512) 482-9346 (fax)

By:



L. Layla Mansuri

State Bar No. 24040394

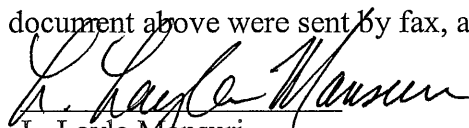
Richard Lowerre

State Bar No. 12632900

ATTORNEYS FOR SIERRA CLUB

CERTIFICATE OF SERVICE

I hereby certify that on June 18, 2007 copies of the document above were sent by fax, and/or mail to the following as indicated below:


L. Layla Mansuri

Mr. William Newchurch
Administrative Law Judge
300 West 15th Street, Suite 502
P.O. Box 13025
Austin, Texas 78711
FAX: 512/475-4994
Via Facsimile

Mr. Charlie McNabb, City Attorney
Ms. Laura Prendergast Gordan,
Deputy City Attorney
2 Civic Center Plaza, 9th Floor
El Paso, Texas 79901
FAX: 915/541-4710
Via First Class Mail

Ms. Veronica S. Najera
Administrative Law Judge
401 East Franklin Avenue, Suite 580
El Paso, Texas 79901
FAX: 915/834-5667
Via Facsimile

Mr. Erich Birch
Ms. Angela Moorman
Birch & Becker, L.L.P.
7000 No. Mopac Plaza 700
FAX: 480-0428
Via Facsimile and First Class Mail

Derek McDonald
Pamela Giblin
Baker Botts, LLP
1500 San Jacinto Center
98 San Jacinto Blvd
Austin, TX 78701-4078
FAX: 512/322-8342
Via Facsimile and First Class Mail

Emily Collins
TCEQ Office of Public Interest Counsel
P.O. Box 13087
Austin, Texas 78711-3087
FAX: 512/239-6377
Via Facsimile and First Class Mail

Mr. Brad Patterson
TCEQ Environmental Law Division, MC
173
P.O. Box 13087
Austin, TX 78711-3087
FAX: 512/239-0606
Via Facsimile and First Class Mail

The Honorable Eliot Shapleigh
Texas Senate District 29
800 Wyoming Ave., Suite A
El Paso, TX 79902-5330
FAX: 512/463-0218
Via First Class Mail

Ms. Veronica Carbajal
Mr. Enrique Valdevia
Texas Rio Grande Legal Aid, Inc.
1331 Texas Avenue
El Paso, Texas 79901
FAX: 915/533-4108
Via Facsimile and First Class Mail

Mr. Taylor Moore
South Side Low Income Housing
Development
7108 Portugal
El Paso, Texas 79912
Via First Class Mail

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY
2007 JUN 18 PM 4:30
CHIEF CLERKS OFFICE